

STATE OF MINNESOTA

OFFICE OF ADMINISTRATIVE HEARINGS

Minnesota Democratic Farmer Labor
Party,

Complainant,

vs.

Minnesota Senate Republican Caucus,
Senator David Senjem, Senator Al
DeKruif, Senator Chris Gerlach, Senator
Joe Gimse, Senator Gretchen Hoffman,
Senator Benjamin Kruse, Senator Ted
Lillie, Senator Geoff Michel, Senator
Carla Nelson, Senator Claire Robling,
Senator Ray Vandever, Senator Pam
Wolf, Senator Michelle Fischbach,
Senator Doug Magnus, Senator John
Pederson, and Steve Sviggum,

Respondents.

**ORDER ON MOTION FOR
SUMMARY DISPOSITION**

The above-entitled matter came before the panel of Administrative Law Judges on the Respondents' motion for summary disposition. Respondents filed their motion on March 16, 2012.¹ A prehearing conference was held at the Office of Administrative Hearings on March 29, 2012. Pursuant to the First Prehearing Order, the Complainant filed a response to the motion on April 27, 2012, and the Respondents filed a reply on May 18, 2012. The OAH record with respect to the motion closed on May 18, 2012.

David J. Zoll, Attorney at Law, Lockridge Grindal Nauen, PLLP, represented the Minnesota Democratic Farmer Labor Party (Complainant or MN DFL). R. Reid LeBeau II, Attorney at Law, Jacobson, Buffalo, Magnuson, Anderson & Hogen P.C., represented the Respondents.

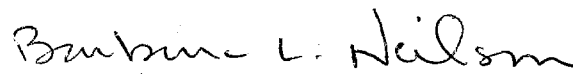
Based upon all of the files, records, and proceedings herein, and for the reasons set out in the attached Memorandum,

¹ The Respondents' filing was titled Pre-Hearing Brief, but it was determined during the prehearing conference that it was appropriate to treat it as a Motion for Summary Disposition.

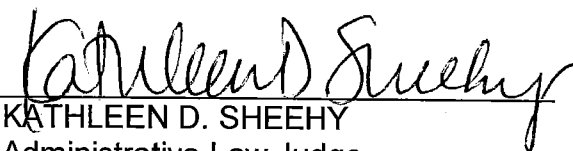
IT IS ORDERED:

1. That Respondents' motion for summary disposition with respect to Senator Doug Magnus is GRANTED.
2. That the claims against Senator Magnus are DISMISSED.
3. That Respondents' motion for summary disposition in all other respects is DENIED.
4. That this matter will proceed to a prehearing conference to be scheduled in the near future.

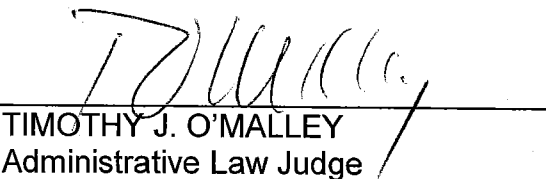
Dated: June 11, 2012



BARBARA L. NEILSON
Presiding Administrative Law Judge



KATHLEEN D. SHEEHY
Administrative Law Judge



TIMOTHY J. O'MALLEY
Administrative Law Judge

MEMORANDUM

The Complaint alleges that the Minnesota Senate Republican Caucus (MNSRC), the named individual Senators, and Steve Sviggum, Communications Director for the Senate Republican Caucus, prepared and/or distributed campaign material that lacked a disclaimer required under Minn. Stat. § 211B.04. The MNSRC is an assumed name used by the Senate Victory Fund, which is a political organization that works to elect Republican State Senators. The MNSRC is separate and distinct from the Senate Republican Caucus, the official State legislative office staffed with State employees.

The material at issue was entitled "Senate GOP Legislative Update" and was prepared for distribution at the Republican Precinct Caucuses on February 7, 2012.² The "Legislative Updates" included the photo and name of each individual Senator, and all but two prominently displayed the MNSRC logo and web addresses for the MNSRC's Facebook account, Twitter account, and website. At the time the Legislative Updates were prepared, the MNSRC website included pages soliciting contributions to the Senate Victory Fund and soliciting volunteers for "campaign opportunities."³

The Complaint maintains that the Legislative Updates were distributed for the purpose of influencing voting and, therefore, meet the definition of "campaign material." Under Minn. Stat. § 211B.04, campaign material is required to include a disclaimer identifying the name and address of the person or committee causing the material to be prepared or disseminated. The Complaint contends that by failing to include a disclaimer on the Legislative Updates, the Respondents violated Section 211B.04.

The Respondents argue that the Legislative Updates were not distributed to influence voting and are not campaign material. They contend that the Legislative Updates are simply constituent communications. In support of their assertion, the Respondents point out that the Updates did not engage in express advocacy for a particular candidate; they discussed general issues and activities relating to the legislative session; and they were disseminated during the legislative session and were paid for with legislative funds. The Respondents contend that the Legislative Updates were designed to inform constituents of their elected officials' policy positions and issues to be discussed in the legislative session. As such, the Respondents maintain that the Legislative Updates are "constituent services pieces" and not campaign material designed to influence voting.

The Respondents have moved for Summary Disposition and dismissal of the Complaint.

² Complaint Ex. A.

³ The web address for the MNSRC is: www.senatevictoryfund.com.

Motion Standard

Summary disposition is the administrative equivalent of summary judgment. Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law.⁴ The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition regarding contested case matters.⁵ A genuine issue is one that is not sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case.⁶

The moving party has the initial burden of showing the absence of a genuine issue concerning any material fact. To successfully resist a motion for summary judgment, the non-moving party must show that there are specific facts in dispute which have a bearing on the outcome of the case.⁷ The nonmoving party must establish the existence of a genuine issue of material fact by substantial evidence; general averments are not enough to meet the nonmoving party's burden under Minn. R. Civ. P. 56.05.⁸ The evidence presented to defeat a summary judgment motion, however, need not be in a form that would be admissible at trial.⁹

When considering a motion for summary judgment, the Court must view the facts in the light most favorable to the non-moving party.¹⁰ All doubts and factual inferences must be resolved against the moving party.¹¹ If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.¹²

Disclaimer Requirement for Campaign Material

Minnesota Statutes § 211B.04 makes it unlawful to prepare or disseminate most types of campaign material without prominently including the name and address of the "person or committee causing the material to be prepared or disseminated"¹³ "Campaign material" is defined, in relevant part, as "any

⁴ *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); Minn. R. 1400.5500K; Minn. R. Civ. P. 56.03.

⁵ See Minn. R. 1400.6600.

⁶ *Illinois Farmers Insurance Co. v. Tapemark Co.*, 273 N.W.2d 630, 634 (Minn. 1978); *Highland Chateau v. Minnesota Department of Public Welfare*, 356 N.W.2d 804, 808 (Minn. App. 1984).

⁷ *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Hunt v. IBM Mid-America Employees Federal*, 384 N.W.2d 853, 855 (Minn. 1986).

⁸ *Id.*; *Murphy v. Country House, Inc.*, 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (Minn. 1976); *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 75 (Minn. App. 1988).

⁹ *Carlisle*, 437 N.W.2d at 715 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)).

¹⁰ *Ostendorf v. Kenyon*, 347 N.W.2d 834 (Minn. App. 1984).

¹¹ See, e.g., *Celotex*, 477 U.S. at 325; *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Greaton v. Enich*, 185 N.W.2d 876, 878 (Minn. 1971); *Thompson v. Campbell*, 845 F. Supp. 665, 672 (D. Minn. 1994).

¹² *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986).

¹³ Minn. Stat. § 211B.04 (a) and (b).

literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election.”¹⁴

The “Legislative Update” is a two-page document that promotes the Senate Republican majority’s legislative accomplishments in 2011, discusses proposed legislative initiatives for the 2012 session, and thanks those attending the Republican precinct caucuses for their involvement. The Legislative Updates were tailored for each of the individual Senators named as a Respondent and included each Senator’s name and photograph.¹⁵

Some individual Senators made changes to the text and format, but an example of the typical two-page Legislative Update is attached to this Order as Exhibit A.

Respondents’ Motion for Summary Disposition

The Respondents concede that on or about February 1, 2012, State Senate Communications Office staff, under the supervision of Communications Director Steve Sviggum, prepared the Legislative Updates for Republican members of the Minnesota Senate. The Respondents note that Senate Counsel reviewed the Updates prior to their dissemination and verbally “passed on their content” as not violating Senate policy relating to prohibited campaign activity.¹⁶

The Respondents assert first that including the links to the MNSRC’s website and Facebook account on the Legislative Updates should not convert the Updates from constituent communications into campaign material. The Respondents cite to *Federal Election Commission v. Wisconsin Right to Life, Inc.* (*WRTL*)¹⁷ in support of this assertion. The *WRTL* decision involved the regulation of broadcast advertisements under the federal Bipartisan Campaign Reform Act of 2002 (commonly known as the McCain-Feingold law). The Act prohibited the broadcast of “express advocacy” advertisements (supporting the election or defeat of a specific candidate) within a certain time frame before a primary or general election, but permitted the broadcast of “issue advocacy” advertisements (those that do not support the election or defeat of a specific candidate). The U.S. Supreme Court held that a broadcast advertisement that did not support a specific candidate but directed listeners to a website created by *WRTL* that allowed visitors to sign up for “e-alerts” that included express advocacy did not convert the advertisement from a (permissible) issue ad into prohibited express advocacy. The Respondents argue that, like *WRTL*, the link

¹⁴ Minn. Stat. § 211B.01, subd. 2.

¹⁵ Complaint Exs. A and B.

¹⁶ See Minnesota Senate Policy 1.45. (Senate Policy 1.45 defines certain campaign activities that are prohibited including “soliciting contributions to a political committee or political fund.” The policy also provides a definition of activities that are not “campaign activity” including “legislative reports.”)

¹⁷ 551 US 449, 473 (2007).

to MNSRC's website in the Legislative Updates should not convert the Updates into campaign material.

Second, the Respondents contend that even if the Updates are campaign material, they substantially complied with the disclaimer requirement. The Updates contain a picture of each Senator with the Senator's name on the bottom front cover and they were only distributed in each Senator's own district. The Respondents point out that two of the Updates (the ones for Geoff Michel and Carla Nelson) included the Senators' own email addresses, and all but two of the remainder included a web link to the MNSRC's Facebook account which contained links to each Senator's own Facebook page. The Respondents maintain that the web links to Facebook are the functional equivalent to email addresses and that, when taken as a whole, the Panel should conclude that the Respondents substantially complied with the disclaimer requirements.¹⁸ In addition, the Respondents contend that Senators Joe Gimse and Doug Magnus did not distribute the Legislative Updates during their caucuses and that, as a result, they should be dismissed as parties.

Third, the Respondents argue that Minn. Stat. § 540.13 provides the Senators with immunity that protects their legislative actions (like constituent services) from civil liability, which Respondents assert includes campaign regulation. The statute provides that: "No member, officer, or employee of either branch of the legislature shall be liable in a civil action on account of any act done in pursuance of legislative duties." Based on this language, the Respondents maintain that their actions in distributing the Legislative Updates should be immune from the Fair Campaign Practices Act.

Finally, the Respondents argue that the MNSRC should be dismissed from the case. According to the Respondents, the MNSRC is the assumed name of the Senate Victory Fund and the Complaint has failed to allege that the Senate Victory Fund had any role in developing the Legislative Updates.

MN DFL Response

The MN DFL opposes Respondents' motion for summary disposition and argues that the Legislative Updates are campaign material and were designed to garner support for Republican candidates for Minnesota Senate. The MN DFL emphasizes that the Updates highlight the accomplishments of the Senate Republicans, summarize the party's goals, criticize Democratic Governor Mark Dayton, and include a prominent reference to the MNSRC website, which solicits financial contributions and volunteers to support the election of Republican Senate candidates. In addition, the MN DFL points out that the Legislative Updates were not provided to all constituents but instead were provided exclusively to individuals attending the Republican Party Precinct Caucuses,

¹⁸ *Hansen v. Stone*, 4-6326-11619-CV (October 28, 2005) (Holding that candidate's email address on campaign lawn sign substantially complied with disclaimer requirement.)

which are inherently political events directly related to the primary and general elections.

Analysis

In a prior decision on a campaign complaint, this Office found a document similar to the Legislative Update to be campaign material.¹⁹ The document was entitled "Legislative Review," was prepared and distributed by Representative Mary Kiffmeyer, and contained various "articles" addressing Ms. Kiffmeyer's legislative work and policy positions. Even though the Legislative Review did not include any reference to the coming election or encourage recipients to vote in a particular manner, the Panel concluded that the Legislative Review was disseminated for the purpose of influencing voting. The Panel found that the Review was clearly designed in conjunction with Representative Kiffmeyer's campaign website and highlighted the themes of her campaign. The panel also found, however, that the Legislative Review substantially complied with the disclaimer requirement because it prominently identified Representative Kiffmeyer's campaign website as the way to contact her, and the website contained the disclaimer: "Paid for by Mary Kiffmeyer Campaign." The Panel concluded that Representative Kiffmeyer took responsibility for disseminating the material and the prominent reference to her campaign website was sufficient acknowledgement that her campaign paid for the material.

The Panel finds that in this matter, the Legislative Updates' prominent display of the MNSRC logo and web addresses preclude granting Respondents' motion for summary disposition. The Updates promote the goals and accomplishments of the Republican Senate majority, were disseminated at the Republican precinct caucuses (as opposed to a general mailing to all constituents), and reference the MNSRC website which solicits financial contributions and volunteers to support the election of Republican candidates for the Minnesota Senate.²⁰ When viewed as a whole, the Panel concludes that the Legislative Updates do not, as a matter of law, fall outside the definition of "campaign material."

The Panel concludes further, however, that the Legislative Updates for Senators Geoff Michel and Carla Nelson are not campaign material. Although the content is the same, their Updates did not include the MNSRC logo and web addresses or the statement encouraging continued involvement with MNSRC and its efforts to elect Republican Senators. Instead, Senators Michel and Nelson modified the text to include their own email addresses and contact information, lending support to the conclusion that this was informational material/communication sent by them to their constituents.

¹⁹ OAH Docket No. 3-0320-21690-CV (Nov. 1, 2010).

²⁰ Unlike *WRTL* where the link to the "express advocacy" was fairly attenuated, the MNSRC logo and website reference are a prominent feature of the Legislative Updates. The Panel sees no basis for concluding that *WRTL* precludes finding the Updates to be campaign material.

In addition, the Panel finds that the fact that the Legislative Updates were distributed during the legislative session and initially paid for with legislative funds is not determinative of whether the Updates are campaign material. In *Kiffmeyer*, the Panel noted that whether the cost of preparing the material is classified as a campaign expenditure or noncampaign disbursement under Minn. Chap. 10A is not controlling.²¹ The test is whether the material was “distributed for the purpose of influencing voting at a primary or other election.”

The Panel also rejects Respondents’ argument that they are entitled to summary disposition because the Legislative Updates substantially complied with the disclaimer requirement. The purpose of the disclaimer requirement is to identify who prepared and disseminated the campaign material.²² Unlike the Legislative Review in *Kiffmeyer*, it is impossible when looking at the Legislative Updates to determine who prepared and disseminated them. The material is titled “Senate GOP Legislative Update” and includes the Seal of the State of Minnesota, the name and photo of the individual senator, and, in all but two of the Updates, the logo and web addresses for the MNSRC, along with the statement: “We appreciate your involvement and hope you will keep in touch.” Without a disclaimer, an individual must guess which person or entity prepared and disseminated the Update. Respondents’ assertion that the MNSRC website contains links to the individual Senators’ Facebook pages does not clarify who prepared or paid for the material.

The Panel is also not persuaded by the Respondents’ immunity claim. Minnesota Statutes § 540.13 does not shield the Senators from their obligation to comply with the Fair Campaign Practices Act, and preparing and disseminating campaign material is not a protected “legislative duty.”²³

As for Respondents’ assertion that the MN DFL has confused the MNSRC with the party unit’s official name (the Senate Victory Fund), the Panel agrees with the MN DFL that any confusion was created by the Respondents. The MN DFL asserts that it named the MNSRC instead of the Senate Victory Fund in the Complaint because that is the entity identified on the Legislative Updates. Until the record is further developed and the identity of the individuals or entities that prepared or disseminated the material is established, it is appropriate to retain the MNSRC as a party to this Complaint.

With respect to the Respondents’ request that Senators Doug Magnus and Joe Gimse be dismissed from the Complaint, the Panel concludes that only

²¹ *Kiffmeyer* at 7 (“The panel concludes that the categorization of written material as either a noncampaign disbursement or a campaign expenditure under Minn. Stat. § 10A is immaterial to the question whether it should properly be considered campaign material under Minn. Stat. Ch. 211B; these classifications are not mutually exclusive.”)

²² *Hansen v. Stone*, OAH Docket No. 4-6326-16911-CV (October 28, 2005).

²³ See Minn. Stat. § 3.08 (In addition to the duties prescribed by law, the officers and employees shall perform the services required of them by rule or vote of the appointing body or by direction of a committee of the appointing body.)

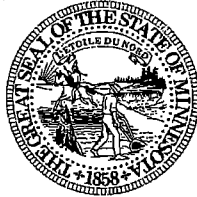
Senator Magnus may be dismissed. Senator Magnus submitted an affidavit in which he stated that he neither prepared nor distributed the Legislative Updates. The MN DFL has submitted no evidence to dispute the accuracy of these statements and has not provided any other evidence to support its claim that Senator Magnus participated in the preparation or dissemination of campaign material in violation of Minn. Stat. § 211B.04. Senator Magnus is, therefore, dismissed as a party to this Complaint.

Senator Gimse submitted a similar affidavit in which he stated that he did not disseminate the Legislative Updates to any individuals at his precinct caucus. His affidavit, however, is silent as to whether he participated in the preparation of the Legislative Update, and the Respondents have put forward no other evidence disputing the allegation that Senator Gimse participated in the preparation of the Legislative Updates. As a result, Respondents' motion for summary disposition as to Senator Gimse is denied. The Respondents have also put forward no evidence as to what role if any Senators Geoff Michel and Carla Nelson may have played in the preparation of the Legislative Updates. Respondents' motion for summary disposition as to Senators Michel and Nelson is likewise denied at this time.

This matter will proceed to a prehearing conference as ordered. Respondents may file additional affidavits clarifying the roles of Senators Gimse, Nelson, Michel, or other Respondents prior to that date and the Panel will reconsider whether they should remain parties in this matter.

B.L.N., K.D.S., T.J.O.

Exhibit A



2012 Session

SENATE GOP Legislative Update

First Budget Surplus Projection in 5 Years

Minnesota's Management and Budget Office announced a **\$875 million surplus** for the state in its November forecast. This is a great budget improvement from the \$5.2 billion deficit the Senate Republicans inherited in the 2011 Legislative Session. By making **tough choices** on the spending side of the budget, prioritizing the state's needs, providing regulatory reform and enhancing job growth – the Senate Republican majority delivered for Minnesota.

Performance is important and how we should be judged. The 2011 budget was set to grow to \$39 billion – the Governor presented a \$37.5 billion budget – and at the end of the unnecessary special session the Governor agreed to the Republican's \$34 billion budget! This was a win for the taxpayers of Minnesota – and obviously a win for the state's budget.

This budget surplus provides not only opportunities as we move ahead, but allows the 2012 Session to focus on **needed government reforms** and efficiency.

**The Senate
Republican
majority
delivered for
Minnesota.**

Redistricting to be unveiled on Feb 21st

The Constitution of Minnesota gives responsibility to the Legislature to redraw the legislative district lines every 10 years, after the census is taken. This is to get back to the Constitutional adage of "...one person, one vote."

In the 2011 Legislative Session, the Republican Senate and House met the redistricting responsibility only to have the bill vetoed by Governor Dayton. This unfortunate veto leaves the redistricting responsibility in the hands of the courts. They will unveil the new district lines on February 21.

All 134 House and 67 Senate Districts will be redrawn and all senators and representatives will be up for election on General Election Day, November 6.

THANK YOU
for joining this
Republican
precinct caucus!

Senator
RAY VANDEVEER



Reform 2.0 to lead session policy

In 2011, the Senate and House majorities led the way to reduce government paperwork and bureaucratic delays in the permitting process. Governor Dayton joined Senate Republicans in the initiative that produced the bipartisan effort.

Now on to the second phase of redesign/reform – hence Reform 2.0. Government reform ideas abound and are the result of numerous outreach meetings to gather citizen input and direction. These redesign efforts are importantly about efficiency and cost control but as importantly “...getting the right services to the right people.”

More Constitutional Amendments coming?

During the 2011 Legislative Session, Senate Republicans successfully fought to allow the citizens of Minnesota to vote on the marriage amendment. No matter how Minnesotans feel individually on the issue, empowering their voice and vote is good, representative government. On the November 6th ballot, all citizens can have their voice directly heard on the important issue of marriage.

Additional constitutional amendments may be considered during this upcoming session. Photo ID for legal voting, a bipartisan redistricting commission, Freedom to Work, supermajority to raise taxes and other issues. The number of questions to be placed on the ballot is also strategically being discussed.

Jobs – Jobs – Jobs

The focus of almost every legislative action taken by Senate Republicans involves jobs and getting people to work. From the government reform issues mentioned above to holding the line on state spending to prioritized tax incentives for job creation – private sector jobs have been our focus. This session will provide many opportunities to make Minnesota a state that works – in many ways. Every bill that passes should be judged, not only on whether it is in the best interests of Minnesota, but if it makes Minnesota work.

**We appreciate your involvement,
and hope you will keep in touch!**



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